Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
October Term, 1993

Re: L.F. JENNINGS OIL COMPANY,
Debtor,

NEW MEXICO ENVIRONMENT DEPARTMENT,
Petitioner,

v.

ORALIA FRANCO, Successor Trustee for
the Estate of L.F. Jennings Oil Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether under 11 U.S.C. § 554(a) the bankruptcy court can approve the trustee's motions to abandon three estate properties after the trustee discovers and reports to the state that the properties are contaminated but before the trustee properly investigates and remediates the contamination contrary to the state's laws designed to protect public health and safety and contrary to 28 U.S.C. § 959(b).

2. Whether the state's successful efforts to eliminate, investigate and remediate contamination at two of the abandoned properties after losing in the bankruptcy court and pending appeal, without seeking a stay of the bankruptcy court's abandonment order, moots the state's claim for definitive guidance on this Court's expression in *Midlantic National Bank v. New Jersey Department of Environmental Protection,* 474 U.S. 755 (1986).

PARTIES IN THE COURT OF APPEALS

John E. Foulston, United States Trustee, 401 N. Market Street, Room 180, Wichita, Kansas 67202 and Oralia Franco, Successor Trustee for the debtor L. F. Jennings Oil Company, Post Office Box 15038, Las Cruces, New Mexico 88004 appeared as the parties in opposition to the New Mexico Environment Department in the Court of Appeals.

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The New Mexico Environment Department respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit for the final order entered on November 3, 1993.

OPINIONS BELOW

On May 18, 1992 the United States Bankruptcy Court for the District of New Mexico issued an unpublished order (App., pp. 19-20) which denied the New Mexico Environment Department's motion to reconsider and quash two abandonment orders issued June 12, 1991 (App., pp. 21-22) and July 12, 1991 (App., pp. 23-24). The United States District Court for the District of New Mexico affirmed the Bankruptcy Court by unpublished memorandum opinion and order issued November 30, 1992 (App., pp. 13-18). The United States Court of Appeals for the Tenth Circuit issued two published orders on September 3, 1993 (App., pp. 6-12) reported at 4 F.3d 887 (10th Cir. 1993) and November 3, 1993 (App., pp. 2-3) reported at 4F.3d (10th Cir. 1993).

JURISDICTION

The first order of the United States Court of Appeals for the Tenth Circuit was entered on September 3, 1993. (App., pp. 6-12.) On motion for clarification of opinion filed by the bankruptcy trustee and response by the New Mexico Environment Department, the Court of Appeals recalled the mandate on its first order by order filed November 3, 1993. (App., pp. 4-5.) The amended order of the Court of Appeals was entered on November 3, 1993. (App., pp. 2-3.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

11 U.S.C. § 554(a) provides:

> After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

28 U.S.C. § 959(b) provides:

> Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

N.M. Stat. Ann. § 74-4-4(C) (Michie 1993) provides:

> The [environmental improvement] board shall adopt regulations concerning underground storage tanks as may be necessary to protect public health and the environment that are equivalent to and no more stringent than federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended, and that shall include:
>
> (1) standards for the installation, operation and maintenance of underground storage tanks;
>
> (2) requirements for financial responsibility;
>
> (3) standards for inventory control;
>
> (4) standards for the detection of leaks from and the integrity testing and monitoring of underground storage tanks;
>
> (5) standards for the closure and dismantling of underground storage tanks;
>
> (6) requirements for record-keeping; and
>
> (7) requirements for the reporting, containment and remediation of all leaks from any underground storage tanks.

The applicable New Mexico Environmental Improvement Board regulations governing corrective action for petroleum underground storage tank systems, EIB/USTR §§ 1200, 1202, 1203, 1204, 1205, 1206, 1208 and 1209, and Appendix A, the corrective action timeline, are set forth at App., p. 42 and following.

STATEMENT OF THE CASE

Important Facts

The New Mexico Environment Department is an executive branch agency of New Mexico state government and is charged, inter alia, with administering a program for identifying and assuring corrective action at leaking underground storage tank contamination sites in the state.[1]

On December 20, 1990, L.F. Jennings Oil Company filed a voluntary Chapter 7 petition in the bankruptcy court. Harley H. Swink was appointed trustee and served until his resignation in March, 1992. John E. Foulston and Oralia Franco are successors to Swink.

The bankruptcy estate included three gasoline stations with underground storage tanks located in Capitan, Carrizozo and Ruidoso, Lincoln County, New Mexico. In connection with selling the stations Swink hired consultants beginning in February, 1991, to perform tank tightness tests and soil sampling to establish whether these three stations were contaminated. Soils at all stations and the tanks at Capitan and Carrizozo were tested by early April, 1991. Most of the fuel was removed from the tanks and sold.

The tank and line tests showed the underground storage tank systems were probably tight. The soil tests showed that actionable levels of leaked petroleum hydrocarbons were present at all three stations.

The New Mexico underground storage tank regulations required Swink to notify the state and to follow through with corrective action by completing a sight assessment and upgrading or removing or closing the tanks. Swink reported on March 28, 1991, for Carrizozo and Ruidoso, and on April 19, 1991, for Capitan. Swink moved to abandon the three stations on April 10, 1991, without service or notice to the environment department

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[1] N.M. Stat. Ann. §§ 9-7A-1, *et seq.*, §§ 74-4-1, *et seq.*, and §§ 74-6B-1, *et seq.* (Michie 1993).

and without indicating the stations were contaminated in his motion to abandon. The bankruptcy court granted Swink's motion by an order entered June 12, 1991, for the Ruidoso station (App., pp. 21-22), and by a second order entered July 12, 1991, covering the Capitan and Carrizozo stations. (App., pp. 23-24.)

After Swink refused to follow through with corrective action on grounds that the stations were abandoned from the estate, the environment department moved in the bankruptcy court for an order to reconsider and quash abandonment on August 16, 1991. The motion was denied after an evidentiary hearing on April 27, 1992.

With concurrence from the environment department the stations at Carrizozo and Ruidoso were deeded by their abandonees on May 19, 1992, to purchasers who agreed to remove the underground storage tanks before taking title.[2]

Jurisdiction Below

The bankruptcy court's jurisdiction in the case is provided at 11 U.S.C. § 301 and 28 U.S.C. §§ 151 and 1334. The district court's jurisdiction is provided at 28 U.S.C. § 158(a). The court of appeals' jurisdiction is provided at 28 U.S.C. § 158(d).

ARGUMENT

This case crystallizes the growing dilemma in environmental bankruptcy practice of what standards should apply where contaminated estate property is sought to be abandoned by a bankruptcy trustee or debtor in possession.

The court of appeals dismissed on the Carrizozo and Ruidoso stations for mootness. On the Capitan station, the court of appeals affirmed the bankruptcy court on the merits, finding that the station could be abandoned since it presented no imminent and identifiable harm to the public health because it was not listed on the state's list of contaminated sites, because there were insufficient data to prove an imminent threat and because the only violation involved the filing of a report. (App., p. 11.) The court of

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[2] The events of May and June 1992 were not presented at the hearing in the bankruptcy court. However, they were raised by the environment department in the district court and were found not have rendered the appeal moot. (App., pp. 15-16.)

appeals' opinion misconstrues the record and the issues. Capitan was not on the state's list because so little was known about it. There were no data to prove an imminent threat because the trustee declined to follow the regulations and investigate the site. The violation was not just for failure to file a report. The missing report should have contained results from the trustee's required investigation.

The last and most comprehensive statement of the Supreme Court on a bankruptcy trustee's abandonment power appeared in 1986.[3] Increasingly, bankruptcy courts have drawn opposing conclusions based on the broad, textual holding of the majority that,

> ... a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.

474 U.S. 507, *versus* the seemingly limiting language of its footnote.[4] Is it enough that public health laws are violated or must the violation be shown to lead directly to human injury or death? As a consequence of the narrower construction trustees are encouraged to drop contaminated properties by § 554 abandonment at the earliest stages and before the due date for lawful requirements that the contamination be characterized. The effect of this practice makes for impasse in developing facts about the contamination. By its opinion below the Tenth Circuit now has drawn the line far on the side of the limiting language in the *Midlantic* footnote 9.

The New Mexico environment department submits that the bankruptcy court's gamble on an absence of information conflicts with the *Midlantic* court's concern for a pragmatic balance between bankruptcy policies and environmental policies. The court of appeals' affirmance of the bankruptcy court on the Capitan station and dismissal of the department's appeal on the Carrizozo and Ruidoso stations, as moot, should be reversed. This

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[3] *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986).

[4] *Viz.*, "This exception to the abandonment power vested in the trustee by § 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm." 474 U.S. 507, ftn. 9.

Court should clarify its *Midlantic* analysis to provide that the existence of laws and regulations governing environmental contamination is enough to trigger compliance with them under 28 U.S.C. § 959 so that investigations will proceed in bankruptcy and an informed decision about what to do can be made.

Question 1

In the bankruptcy court the environment department's witness testified that the bankruptcy trustee was apparently in compliance with the underground storage tank regulations on the date the abandonment request was filed. On the date the abandonment order for Ruidoso issued, however, the trustee was due to have completed an on-site investigation under EIB/USTR-12, § 1206 and had failed to do so. The Capitan and Carrizozo stations were in violation for the same reason on July 12, 1991 when the bankruptcy court approved those abandonments. (App., p. 32.)[5]

The state regulations are police power requirements designed to confer optimum health, safety, comfort and economic and social well being on the state's inhabitants. N.M. Stat. Ann. § 74-1-2 (Michie 1993). Protection of the state's healthful environment is fundamental under the New Mexico Constitution. N.M. Const. Art. XX, Sec. 21.

The Court of Appeals found that absence of the Capitan station from the state's list of sight priorities shows that the site was not an immediate threat to public health or safety. (App., p. 11.) The state's expert witness in the bankruptcy court testified to the contrary that benzene constituents in the gasoline at the three stations are carcinogenic and can explode when mixed with oxygen inside the USTs or in sewer lines and man holes into which they can migrate. (App., pp. 32-33.) He said that based upon the meager information available, the station at Ruidoso constituted the most serious risk to public health because gasoline had contaminated groundwater there.[6]

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[5] In it's oral findings the bankruptcy court distinguished the trustees' failure to report from the Supreme Court's concerns in *Midlantic*. (App., p. 26.) The distinction between the required reports and the investigative work which must be done in order to make them only emphasizes the wrongheadedness of a rule that permits abandonment of contaminated property without regard to requirements for characterization of the contamination.

[6] This fact should have been discovered by the trustee in his required investigation of the site. The trustee did not learn of the ground water contamination at Ruidoso before the abandonment order because he did not do the EIB/USTR-12, § 1206 investigation.

(App., p. 32.) He said that all three stations constitute serious environmental health and safety threats. (App., pp. 32-34.)[7]

Under 28 U.S.C. § 959(b), contaminated estate property must be managed according to the requirements of valid state laws in the same manner as the owner would be bound to do.[8] The bankruptcy court's preoccupation with the imminence of threat and the court of appeals' concurrence in it, miss the broader teaching of *Midlantic* that a set of laws designed to protect against threats to public health should be obeyed before abandonment is allowed.

Courts that have drawn the line for broader environmental protection are compiled in the recent case of *Alabama Surface Mining Commission v. N.P. Mining Company, Inc.*, 963 F.2d 1449 (11th Cir. 1992). There, the question was whether post-petition mine reclamation penalties should have administrative expense priority under 11 U.S.C. § 503(b). The Eleventh Circuit reasoned that they should, because punitive assessments are ordinary incidents of the trustee's preservation of the estate. Albeit § 503(b) does not involve the abandonment power, *N.P. Mining Company, Inc.*, shows the wisdom of a broad interpretation of trustee obligations when they come up against local enactments designed to protect the environment and public health. Such is the approach that trustees should be required to take when dealing with abandonment of contaminated estate properties.

Question 2

While the environment department's appeal from the bankruptcy court to the district court was pending, Foulston moved to dismiss the appeal as moot with respect to the Carrizozo and Ruidoso stations on grounds that (1) the department had acknowledged that the sites did not pose a serious threat

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[7] Ground water contamination at the Ruidoso station was not found until NMED investigated the site in anticipation of the April 27, 1992 evidentiary hearing in the bankruptcy court.

[8] In his oral ruling the bankruptcy judge said that if the department had filed a timely objection rather than a motion for reconsideration, he might have ordered removal of the remaining gasoline in the tanks; but that he would have approved the abandonment. (App., p. 26.) The bankruptcy court's hypothetical remedy is less than the state regulations require and is presumptively contrary to the holding in *Midlantic* that "[n]either the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety." 474 U.S. at 502.

to public health, and (2) each of the properties was sold to good faith purchasers. The motion was denied in the district court's final order. (App., p. 16.) The district court found that the environment department still wanted the trustee to retake possession at the Capitan station and that the department's request for a declaration that all three abandonments were error, made the controversy real. (App., p. 16.) The court of appeals held that the department's claim *was* moot because the Capitan station was not an imminent threat and because the claim for a declaration of error against the Carrizozo and Ruidoso stations was merely a request for an advisory opinion. (App., p. 10.)

The doctrine of mootness requires that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459, ftn. 10 (1974). As the district court below noted in its memorandum opinion, "[i]f events transpire during the pendency of the [bankruptcy] appeal which prevent the appellate court from granting effective relief, the appeal will be dismissed as moot." *In the Matter of T & H Diner, Inc.*, 108 B.R. 448, 452 (D.N.J. 1989). Where, however, events moot some issues and not others, there is still jurisdiction to consider the remaining issues. *Federal Deposit Insurance Corp. v. Jennings*, 816 F.2d 1488, 1491 (10th Cir. 1987).

Moreover, an appeal is not rendered moot if the reviewing court is able to grant effective relief, and particularly if the underlying dispute between the parties is one "capable of repetition, yet evading review." *In re Commerce Oil Co.*, 847 F.2d 291 (6th Cir. 1988). Here, the line drawn by the court of appeals in the *L.F. Jennings Oil Company* bankruptcy hinders responsible management of contaminated estate property and confounds the state's required investigation.

Because of the environment department's unusual procedural entry into the *L.F. Jennings Oil Company* bankruptcy case, there is no underlying complaint for declaratory judgment brought under 28 U.S.C. § 2201. Nonetheless, declaratory relief is the essence of what the department sought below and seeks here. Bankruptcy courts and federal courts on appeal are rife with irreconcilable digressions concerning a trustee's power to abandon environmentally contaminated estate property. The environment department submits that this Court's updated declaration is needed and that this case is not moot. See *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115, 122 (1974).

As to the matter of a stay, the department did not seek a stay under Bankruptcy Rule 8005 because, as a public policy matter, the tank removal and soil remediation connected with it at Carrizozo and Ruidoso and the continuing investigation of ground water contamination at Ruidoso were in the best interest of all concerned, including the subsequent purchasers, the estate, its creditors and the public health. To have sought a stay would have been irresponsible, given the trustee's previous declaration that the estate could not and would not expend any funds for these activities, based upon the demands of the FDIC. (App., pp. 38-39.)

The environment department's requested construction of *Midlantic* is not impermissible activism,[9] as argued by the trustee below. Nor is the interpretation given by the bankruptcy court the only one possible. The better rule for environmental pollution cases in bankruptcy is that the entity in the best position to prevent and discover contamination should be responsible for investigating and cleaning it up. Any other rule provides a loophole and encourages abandonment of contaminated property without timely remediation.

CONCLUSION

This Court should declare as its rule that trustees must take immediate steps to investigate, contain and remediate environmental contamination at estate properties. Abandonment of such properties should not be permitted until compliance with applicable environmental laws and regulations for the protection of public health is demonstrated. The Court's reorientation of bankruptcy trustees away from the path of abandoning contaminated property before it is characterized is overdue.

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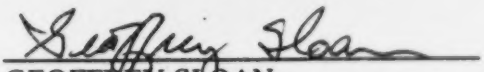
[9] That is, an interpretation which reads *Midlantic* to mean that compliance with state police power laws in the interest of public health must obtain prior to abandonment. Compare *In re FCX, Inc.*, 96 B.R. 49 (E.D.N.C. 1989) and the cases cited in footnote 11 at 96 B.R. 54.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

By: 

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